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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 213

UNITED STATES OF AMERICA,
Petitioner,

against

ETTORE ZUCCA, also known as MARIO SARNI,
also known as ETTORE SARNI ZUCCA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ORRIN G. JUDD,
Attorney for Respondent.

EARLE K. MOORE,
Of Counsel.

August 24, 1955

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Statement

Respondent (defendant in the denaturalization proceeding below) believes that the judgment of the United States Court of Appeals for the Second Circuit was correct, and that there is no necessity for this Court to review it on certiorari.

Respondent accepts Petitioner's statement concerning the facts, the opinions below, the jurisdiction of the Court, the question presented and the statute involved.

The complaint, seeking to revoke a naturalization certificate issued to defendant in 1944 (R. 3), charges him

with willful concealment of material facts concerning his alleged membership in the Communist Party "including the Workers Communist Party and other organizations affiliated with or controlled by the Communist Party" until 1947 (R. 5). Trial of the issues presented by the complaint would involve a detailed review of defendant's life history, political beliefs, and moral character, as well as the background of numerous unspecified organizations, and impose on defendant considerable burdens of investigation and legal defense. It is fair that he should be spared these burdens if the complaint against him does not conform with the requirements laid down by Congress.

I

The decision below was in accordance with the contemporaneous interpretation of the denaturalization statute.

The Court of Appeals, affirming a judgment of the District Court for the Southern District of New York, held that an action to cancel an order of naturalization could not be brought without an affidavit of good cause under Section 340(a) of the Immigration and Nationality Act of 1952 (8 U. S. C. A. §1451(a)).

The statute provides that:

> "It shall be the duty of the United States district attorneys for the respective districts *upon affidavit showing good cause therefor*, to institute proceedings in any court specified in subsection (a) of Section 1421 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the

> order admitting such person to citizenship and canceling the certificate of naturalization . . ." (Italics added).

This language, derived from Section 15 of the Act of June 29, 1906 (34 Stat. 596, 601), was authoritatively interpreted at the time as making the affidavit of good cause a prerequisite to the institution of an action. The Attorney General of the United States, on March 26, 1907, advised the Secretary of Commerce and Labor that:

> "I am therefore of opinion that before any United States Attorney is authorized to institute proceedings for the cancellation of a naturalization certificate, he should be furnished with a proper affidavit on which the proceedings may be based." (Quoted in Appendix to Petition at A. 25-26.)

The United States Court of Appeals for the District of Columbia Circuit upheld this principle in a decision in 1912, stating that:

> "Congress was not unmindful of the value of a certificate of citizenship, and, in providing the remedy, coupled therewith the condition that an affidavit should be presented to the district attorney, stating the facts necessary to the maintenance of the suit." (*Cohen* v. *United States*, 38 App. D. C. 123, 126.)

In 1912 this Court stated of the Act:

> "It merely provides that, on good cause shown, the question whether one who claims the privileges of citizenship under the certificate of a court has procured that certificate through fraud or other illegal contrivance, shall be examined and determined in orderly judicial proceedings." *Johannessen* v. *United States*, 225 U. S. 227, 242.

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No. 213

UNITED STATES OF AMERICA,

Petitioner,

v.

ETTORE ZUCCA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

BRIEF FOR RESPONDENT

ORRIN G. JUDD,
Attorney for Defendant.

MORRIS A. WIRTH,
EARLE K. MOORE,
IRWIN M. ROSENTHAL,
of Counsel.

clearly defined procedure, Congress insisted on the detailed, explicit provisions of § 15.'"* (Italics added)

The most recent case in the Ninth Circuit recognized the rule of the *Bindczyck* case, and decided that the notice provisions of the statute were mandatory, because of the exclusive nature of the Federal statute. *Stenerman* v. *Brownell,* 204 F. 2d 336, 340 (1953). In other words, that Court has abandoned the theory of the *Schwinn* case, that the statute is inclusive rather than exclusive.

The other case cited by the Government as involving a conflict is *United States* v. *Tuteur,* 215 F. 2d 415 (7th Cir. 1954). As Judge Ryan pointed out in *United States* v. *Candela,* 131 F. Supp. 249, 252, *supra,* the determination there was dictum, since the Court of Appeals in reversing the District Court's granting of summary judgment need not have passed upon the necessity of an affidavit. The part of the opinion dealing with the affidavit simply cited the *Schwinn* case (215 F. 2d at 419), without reviewing the history of the statute or discussing the effect of this Court's decision in *Bindczyck* v. *Finucane.*

Not every formal conflict between a court of appeals' decision and prior opinions of another court of appeals compels granting a petition for certiorari. This Court's rule on the subject specifies only that "The following, while *neither controlling* nor fully measuring the court's discretion, indicate the character of reasons which will be considered. * * *" (Rule 19, subd. 1(a), italics added.)

It has been stated that a conflict with a court of appeals' decision which has been discredited or which has lost weight by intervening decisions of the Supreme Court or other courts of appeals will not be ground for certiorari to issue. Stern and Grossman, *Supreme Court Practice,* 1950, page 101 and 2d ed., pages 411-13; see also

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*Section 15 of the 1906 Act, to which the Court referred, is now Section 340(a) of the Immigration and Nationality Act of 1952 (see pp. 2-3, *supra*).

Stern, *Denial of Certiorari Despite a Conflict*, 66 Harv. L. Rev. 465 (1953). Such procedural questions as may arise in connection with the filing of an affidavit (See Petition, p. 6) may be considered in the lower courts. None is presented on the record in the instant case.

The decision below will not place any serious burden on the United States Attorneys. The discovery provisions of the Federal Rules of Civil Procedure are applicable to denaturalization proceedings. Disclosure of the Government's case must be made before trial in any event, and the decision below merely requires it to be made at the outset.

On the other hand, the requirement of a preliminary showing of good cause will protect naturalized citizens from the harassment and expense of litigation in cases where an adequate preliminary showing cannot be made.

It is not necessary for this Court to review the well-reasoned opinion in the present case in order to make it clear that the interpretation of the denaturalization statute adopted when it was first enacted in 1906 is still valid, and that an affidavit of good cause is a necessary part of a complaint under the statute.

CONCLUSION

The petition for a writ of certiorari should be denied.

ORRIN G. JUDD,
Attorney for Respondent.

EARLE K. MOORE,
Of Counsel.

August 24, 1955.

The 1906 Statute

The Government brief (pp. 2-3) sets forth the material provisions of the Immigration and Nationality Act of 1952 (Sec. 340). Since that section was concededly derived from Section 15 of the Act of June 29, 1906 (34 Stat. 596, 601), we deem it useful to quote at the outset the language of the 1906 Act:

> "Section 15. That it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and cancelling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured. In any such proceedings the party holding the certificate of citizenship alleged to have been fraudulently or illegally procured shall have sixty days personal notice in which to make answer to the petition of the United States; and if the holder of such certificate be absent from the United States or from the district in which he last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the state or the place where such suit is brought."

We find no substantial difference between this language and that now contained in Section 340. The notice provision, however, follows immediately after the sentence referring to the affidavit showing good cause and restricting the venue instead of being in a separate paragraph as in Section 340.